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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 615

SAMUEL H. SHEPPARD,

PETITIONER,

v.

THE E. W. SCRIPPS COMPANY,
LOUIS B. SELTZER,
SAMUEL R. GERBER,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming the order of the United States District Court, Northern District of Ohio, Eastern Division granting the Respondents' Motions to Dismiss.

Citation to Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 421 F.2d 555 and is set

forth in our Appendix, pp. 9-16. The District Court order is set forth in our Appendix, pp. 17-31.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Does Petitioner's complaint under the provisions of 42 U.S.C. Section 1983 fail to state a cause of action on the ground that this Honorable Court, in *Sheppard v. Maxwell*, 384 U.S. 333 (1966) determined that the deprivation of Petitioner's constitutional right was caused solely by the trial judge and was in no way attributable to Respondent Gerber?

Statement of the Case

Appellant, in his complaint filed in the United States District Court, Northern District of Ohio, Eastern Division, (App. page 32) alleges a deprivation of constitutional rights and seeks recovery of damages under the provisions of 42 U.S.C., Section 1983. Said complaint alleges the murder of Petitioner's wife on July 4, 1954, and his arrest, indictment, trial and conviction therefor. Recovery is sought from the publisher of a newspaper, its editor and the local county coroner, Respondent Gerber. It is alleged that as a result of conspiratorial conduct of the Respondents during the investigatory and trial proceedings culminating in his conviction, Petitioner was deprived of a fair trial, due process of law and the rights, privileges and immunities secured to him by the United States Constitution. The judgment of conviction was subsequently vacated by this Honorable Court and the cause remanded for a new trial in the state Court, which resulted in a verdict of acquittal.

The District Court sustained Respondents' Motion to Dismiss the complaint predicating its opinion upon two conclusions of law:

1) The complaint, on its face, did not allege conduct by Gerber "under color of law";

2) Gerber's position as coroner was quasi judicial in character affording him immunity from said action.

By opinion dated January 21, 1970, the Court below affirmed the District Court order and formulated as the sole issue "whether Gerber's acts were the cause of the alleged constitutional deprivation suffered by Appellant (Petitioner)". Said Court expressly refrained from expressing an opinion as to whether or not Gerber's acts were committed "under color of law" and as to whether Gerber was entitled to judicial immunity. The basis for the affirmance of the District Court order was that this Honorable Court, in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) had adjudicated, with finality, the fact that the Trial Judge was the sole cause of the deprivation of Petitioner's constitutional rights. The dismissal of Petitioner's complaint, without even an answer to the merits thereof having been filed, was thereby affirmed.

Reasons for Granting the Writ

1. Petitioner's Complaint *Does* State a Cause of Action, for Purposes of Adjudicating Respondents' Motion to Dismiss Since the Allegations Contained therein Must Be Accepted as True.

2. This Honorable Court, in *Sheppard* v. *Maxwell* Did Not Place *Exclusive* Responsibility for the Deprivation of Petitioner's Constitutional Rights Upon the Trial Judge, But Indeed Considered and Gave Weight to the Actions of Respondent Gerber.

Petitioner respectfully submits that the interpretation of the Court below with regard to the *Sheppard v. Maxwell* opinion is inaccurate and contends that said opinion embraces the acts of Respondent Gerber and condemns them.

In support hereof, Petitioner respectfully refers the attention of this Honorable Court to the following remarks of Mr. Justice Black in the *Sheppard v. Maxwell* opinion, to which emphasis is supplied:

"*From the outset officials* focused suspicion on Sheppard. After a search of the house and premises on the morning of the tragedy, *Dr. Gerber, the Coroner*, is reported — and it is undenied — to have told his men: 'Well, it is evident the doctor did this, so let's go get the confession out of him.' He proceeded to interrogate and examine Sheppard while the latter was under sedation in his hospital room. On the same occasion, *the Coroner* was given the clothes Sheppard wore at the time of the tragedy together with the personal items in them."

"From there on (July 7, 1954, the day of Marilyn Sheppard's funeral), headline stories repeatedly stressed Sheppard's lack of cooperation with the police and other officials. Under the headline 'Testify Now In Death, Bay Doctor Is Ordered,' one story described a visit by *Coroner Gerber* and four police officers to the hospital on July 8. When Sheppard insisted that his lawyer be present, *the Coroner* wrote out a subpoena and served it on him. Sheppard then agreed to submit to questioning without counsel and the subpoena was torn up. The officers questioned him for several hours. On July 9, Sheppard, *at the request of the Coroner*, reenacted the tragedy at his home *before the Coroner*, police officers, and a group of newsmen who apparently were invited *by the Coroner*. The home was locked so that Sheppard was obliged to wait outside *until the Coroner*

arrived. Sheppard's performance was reported in detail by the news media along with photographs."

"But subsequent newspaper articles reported *that the Coroner* was still pushing Sheppard for a lie detector test."

"The following day, July 21, 1954, another page one editorial (Cleveland press published by Appellees Seltzer and E. W. Scripps Company) was headed: '*Why No Inquest? Do It Now, Doctor Gerber.*' *The Coroner* called an inquest the same day and subpoenaed Sheppard. It was staged the next day in a school gymnasium: *the Coroner presided* with the County Prosecutor as his advisor and two detectives as bailiffs. In the front of the room was a long table occupied by reporters, television and radio personnel and broadcasting equipment. The hearing was broadcast with live microphones placed at the Coroner's seat and the witness stand. A swarm of reporters and photographers attended. Sheppard was brought into the room by police who searched him in full view of several hundred spectators. Sheppard's counsel were present during the three day inquest but were not permitted to participate. When Sheppard's chief counsel attempted to place some documents in the record, he was forcibly ejected from the room *by the Coroner* who received cheers, hugs and kisses from the ladies in the audience. Sheppard was questioned for five and one-half hours about his actions on the night of the murder, his married life, and a love affair with Susan Hayes. At the end of the hearing *the Coroner* announced that he 'could order Sheppard held for the Grand Jury, but would not do so.'"

"A front-page editorial on July 30, 1954 asked: 'Why Isn't Sam Sheppard In Jail?' It was later titled, 'Quit Stalling — Bring Him In.' After calling Sheppard 'the

most unusual murder suspect ever seen around these parts' the article said that 'except for some superficial questioning *during Coroner Sam Gerber's inquest* he has been scot-free of any official grilling***."

"*With this background* the case came on for trial two weeks before the November general election at which the Chief Prosecutor was a candidate for Common Pleas Judge and the Trial Judge, Judge Blythin, was a candidate to succeed himself."

"It is clear that *the totality of circumstances* in this case also warrants such an approach (the prevention of unfairness)***. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people."

"And it is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses *and especially the Coroner* and police officers:*** the exclusion of such evidence in Court is rendered meaningless when news media make it available to the public. For example, the publicity about Sheppard's refusal to take a lie detector test *came directly from police officers and the Coroner.*"

It is respectfully submitted that the Supreme Court of the United States has expressly condemned the conduct of Respondent Gerber and has denoted such as one of the factors contributing and causing the deprivation of Petitioner's constitutional rights. The Trial Judge is among those who bear this responsibility, *but his is not an exclusive burden.* The concept of "the totality of the circumstances"

embraces events *prior to* as well as during trial. Respondent Gerber is specifically delineated as a constitutional offender by the language of the Supreme Court as hereinabove quoted. Petitioner respectfully contends, that this language alone is inconsistent with the conclusion of this Honorable Court placing exclusive blame on the Trial Judge. The conduct of Respondent Gerber was a causal factor.

Moreover, whether or not Respondent Gerber's conduct "caused" the deprivation of Petitioner's constitutional rights should properly be a burden of proof to be assumed by Petitioner at trial. No response to the merits of Petitioner's contentions has been proffered by the Respondent. To support their procedural objections by relying upon the opinion in *Sheppard* v. *Maxwell* is, it is respectfully submitted, a misinterpretation thereof.

If Respondent Gerber's conduct was not a contributing cause of the deprivation of Petitioner's constitutional rights, he would not have been so prominently mentioned in the opinion by the Supreme Court of the United States.

Let the issue of the effect of Respondent Gerber's conduct be adjudicated by a fact-finding tribunal.

Petitioner has alleged that the acts of Respondent Gerber contributed to and were responsible for the deprivation of his constitutional rights. On a Motion to Dismiss these allegations must be accepted as true. The determination of this Honorable Court in *Sheppard* v. *Maxwell*, "that Petitioner's rights were violated by the 'judge's failure to insolate the proceedings from prejudicial publicity and disruptive influences' does not necessarily preclude the possibilty that his rights might also have been violated by a conspiracy to prosecute him without cause and to prevent a fair trial. Petitioner has alleged that certain private persons engaged in publishing newspapers and a public official conspired to corrupt the judicial process in order

to obtain his conviction for murder, and, on a motion to dismiss, we must accept these allegations as true. The deprivation of constitutional rights which the Supreme Court found in *Sheppard* v. *Maxwell* and the deprivation alleged here are not mutually exclusive, and the fact that Petitioner chose one as the basis for his habeas corpus petition in 1963 should not prevent him from basing a damage suit on the other." (Dissenting opinion in the Court below by Circuit Judge McCree.)

Conclusion

For the several reasons set forth above, Petitioner urgently prays that a Writ of Certiorari issue from this Honorable Court to review the opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted:

F. Lee Bailey
Gerald Alch
Benjamin L. Clark
Russell A. Sherman

APPENDIX A

Filed Jan 21 1970
CARL W. REUSS, Clerk

No. 18977

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL H. SHEPPARD,
Plaintiff-Appellant,
v.
THE E. W. SCRIPPS COMPANY,
LOUIS B. SELTZER, SAMUEL R. GERBER,
Defendants-Appellees.

APPEAL from the United States District Court,
Northern District of Ohio, Eastern Division.

Decided January 21, 1970.

Before: PECK, McCREE and COMBS, Circuit Judges.

PECK, Circuit Judge. The complaint filed in the District Court in this action alleges a deprivation of constitutional rights and seeks recovery of damages under the provisions of 42 U.S.C. § 1983. The complaint alleges the murder of plaintiff's wife July 4, 1954, and his arrest, indictment, trial and conviction therefor. Recovery is sought from the publisher of a newspaper, its editor and the local county coroner, hereinafter referred to as Gerber. It is alleged that as a result of conspiratorial conduct of the defendants during the investigatory and trial proceedings culminating in his conviction plaintiff was deprived of a fair trial, due process of law and the rights, privileges and immunities secured to him by the United States Constitution. The

judgment of conviction was subsequently vacated by the Supreme Court and the cause remanded for a new trial in the state court, which resulted in a verdict of acquittal. In the present action, the District Court sustained the defendants' motion to dismiss the complaint, and this appeal was perfected from the order granting that motion.

Early in its opinion, the District Court offers this observation:

> "At the outset this court determines that the complaint must fail in its entirety if, for any reason, it is insufficient to state a claim as to Gerber, for, since defendants Scripps and Seltzer are chargeable only as private citizens and cannot be said to act 'under color of any State Law,' it is clear from nearly a hundred years of case law that the Civil Rights Act, affording protection against deprivation of civil rights by state action, is not applicable to them, absent a conspiracy with one so acting."

We are in accord with this expression. *See Shelly v. Kraemer*, 334 U.S. 1 (1947); *The Civil Rights Cases*, 109 U.S. 3, 17 (1883); *Mulligan v. Schlachter*, 389 F.2d 231 (6th Cir. 1968); *Cooper v. Wilson*, 309 F.2d 153 (6th Cir. 1962); *Jones v. Alfred H. Mayer Company*, 255 F. Supp. 115 (E. D. Mo. 1966).

In his brief appellant states that the decision of the District Court appealed from was predicated upon two conclusions of law, namely that the complaint did not allege conduct by Gerber "under color of law," and that Gerber's position as coroner was quasi-judicial in character, affording him immunity. While it is true that the opinion of the District Court deals with these two issues at length, that opinion further resolves a third issue adversely to appellant in this language: "[N]othing Gerber is alleged to have done under color of law could properly be said to be the *cause* of any deprivation of rights the plaintiff alleged-

ly suffered." If this is true, whether or not the acts were done under color of law obviously becomes immaterial.

The issue as to whether Gerber's acts were the cause of the alleged constitutional deprivation has been passed upon by the Supreme Court in the opinion resulting in the vacation of appellant's conviction and the remand for retrial (*Sheppard* v. *Maxwell*, 384 U.S. 333 (1966)). That this issue was squarely before the Supreme Court becomes apparent in the first paragraph of Mr. Justice Clark's opinion (384 U.S. 335):

> "This federal habeas corpus application involves the question whether Sheppard was deprived of a fair trial in his state conviction for the second-degree murder of his wife because of the trial judge's failure to protect Sheppard sufficiently from the massive, pervasive and prejudicial publicity that attended his prosecution .... We have concluded that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment and, therefore, reverse the judgment."

The opinion proceeds with a detailed review of the facts of the offense and of the trial, which is perhaps best summed up in the often quoted language of Judge Bell of the Supreme Court of Ohio and which is set forth in Justice Clark's opinion (384 U.S. 356):

> " 'Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre .... In this atmosphere of a "Roman holiday", for the news media, Sam Sheppard stood trial for his life.' 165 Ohio St., at 294, 135 N.E. 2d 342."

Justice Clark follows that quotation with this observation: "Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public." The very fact that the trial was conducted under such deplorable conditions, however, points up the fact that the deprivation of appellant's constitutional rights resulted from the unfortunate circumstances accompanying the trial itself rather than from any conduct Gerber may have engaged in. That the Supreme Court found this to be true clearly appears from its opinion, which squarely places the blame where it really belongs under our system of administration of justice, on the trial judge.

After observing that the trial began two weeks "before a highly contested election at which both Chief Prosecutor Mahon and Trial Judge Blythin were candidates for judgeships," Justice Clark continues (384 U.S. 354-55):

> "While we cannot say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone, the court's later rulings must be considered against the setting in which the trial was held. In light of this background, we believe that the arrangements made by the judge with the news media caused Sheppard to be deprived of the 'judicial serenity and calm to which [he] was entitled.' Estes v. State of Texas . . . 381 U.S., at 536, 85 S. Ct., at 1629. The fact is that bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom, hounding most of the participants in the trial, especially Sheppard."

After a further review of the facts and the publicity attendant upon the trial, the opinion commented upon the absence of rules governing the use of the courtroom by newsmen and insulating the proceedings from prejudicial

publicity and disruptive influences, and then concluded "that these procedures would have been sufficient to guarantee Sheppard a fair trial." (384 U.S. 358). Finally, in concluding the opinion Justice Clark stated (384 U.S. 363):

> "Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition."

The essence of the complaint in the present case is contained in its allegations charging a deprivation of constitutional rights by Gerber, but as is demonstrated in the foregoing quotations the Supreme Court has already determined that the trial judge, not Gerber, is responsible for that deprivation. In view of that determination, it must be here concluded that the District Judge properly found that no cause of action was stated.

Since we find the controlling issue to have been determined by the Supreme Court it is unnecessary to here examine the other grounds relied upon by the District Judge, and we expressly refrain from expressing an opinion on the claimed deficiency of the complaint in not specifically stating that the various acts alleged were committed "under color of law," and as to whether Coroner Gerber was entitled to judicial immunity. We observe, however, that even in the absence of the opinion in *Sheppard v. Maxwell, supra*, the greater weight of authority and better reasoned decisions would require us to find the lack of a cause of action. *Striker v. Pincher*, 317 F.2d 780 (6th Cir. 1963); *Cuiksa v. City of Mansfield*, 250 F.2d 700 (6th Cir. 1957); *Dunn v. Gazola*, 216 F.2d 709 (1st Cir. 1954); *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1954); *Reinke v. Walworth County Sheriff*, 282 F. Supp. 377 (E.D. Wis. 1968); *Sinchak v. Parente*, 262 F. Supp. 79 (W.D. Pa. 1966). In *Striker v. Pincher, supra*, this court considered a situation

in which plaintiff claimed to have been deprived of constitutional rights by County Sheriff Pincher. We therein observed that "Pincher did not directly deprive Striker of any right of any sort. He had no authority or shadow of authority in respect to the trial. It is not claimed that statute, custom or usage gave Pincher any authority in respect to the trial . . . ." (317 F.2d 783). This pronouncement has precise application to the circumstances with which we are concerned, in which Gerber "had no authority or shadow of authority in respect to the trial." In *Cūiksa, supra*, we considered a situation in which the alleged deprivation, as here, consisted of actions on the part of a defendant in initiating the prosecution and in testifying at the trial. We held that these actions did not deprive the appellant therein of any constitutional right, and with reference to the constable defendant-appellee observed, "Nor is he responsible for the subsequent actions and rulings of the judge." (250 F.2d 704). Similarly, in the present case it could scarcely be contended that Gerber was in any way responsible for Judge Blythin's conduct of the trial. In *Whittington, supra*, another situation existed in which the plaintiff alleged a deprivation of rights, but wherein the court pointed out that "[i]f there was any denial of due process, the efficient cause thereof was the omission of the state probate judge to give notice of the proceeding. That failure is not attributable to these defendants." (201 F.2d 811). The analogy to the case here reviewed is too obvious to require comment.

In accordance with the foregoing, the order of the District Court from which this appeal was perfected is affirmed.

McCree, Circuit Judge, concurring. I concur in the result reached by my brethren. However, I do not agree with their conclusion that the Supreme Court's determination in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), that appellant's rights were violated by "the [trial] judge's failure

to insulate the proceedings from prejudicial publicity and disruptive influences", 384 U.S. at 385 n. 11, necessarily precludes the possibilty that his rights might also have been violated by a conspiracy to prosecute him without cause and to prevent a fair trial. Appellant has alleged that certain private persons engaged in publishing newspapers and a public official conspired to corrupt the judicial process in order to obtain his conviction for murder, and, on a motion to dismiss, we must accept these allegations as true. The deprivation of constitutional rights which the Supreme Court found in *Sheppard* v. *Maxwell* and the deprivation alleged here are not mutually exclusive, and the fact that appellant chose one as the basis for his habeas corpus petition in 1963 should not prevent him from basing a damage suit on the other.[1]

Nevertheless, I agree with the District Judge who held that the allegedly actionable conduct of Coroner Gerber is insulated from liability under the Civil Rights Act by a doctrine analogous to that of judicial immunity. As the District Judge observed in his opinion, the Supreme Court has held that the Civil Rights Act did not abrogate the common law immunity of certain public officials for actions within their jurisdiction.[2] This doctrine applies not only to judges, but also to other officials whose duties are quasi-

---

[1] An action for malicious prosecution might have been filed in state court, but that does not render unavailable the remedies of the Civil Rights Act. Diversity is not alleged here, and therefore I do not consider whether appellant has a good cause of action for malicious prosecution under the Ohio tort law. *See Sheppard* v. *The E. W. Scripps Co.*, No. 18,978 (6th Cir. 1969).

[2] *Pierson* v. *Ray*, 386 U.S. 547 (1967); *see Bradley* v. *Fisher*, 13 Wall. 335 (1872) (common law immunity). The immunity applies even to acts which are alleged, as are those here, to have been maliciously or corruptly motivated. *Pierson* v. *Ray*, 386 U.S. at 554. The policy behind this rule is not difficult to discern. As the Supreme Court expressed it, a judge "should not have to fear that unsatisfied litigants may hound him with litigation charging malice and corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Id.*

judicial. *Kenney v. Fox*, 232 F.2d 288 (6th Cir. 1956), *cert. denied sub nom. Kenney v. Killian*, 352 U.S. 855 (1956). And the same immunity has been extended to coroners. *Hebert v. Morley*, 273 F. Supp. 800, 802-03 (C.D. Cal. 1967). I agree with the District Court that the only conduct in which defendant Gerber is alleged to have engaged under color of law must be characterized, under the laws of Ohio and under the Civil Rights Act, as quasi-judicial. *See State ex rel. Harrison v. Perry*, 113 Ohio St. 641, 644-45, 150 N.E. 78 (1925). Since this action cannot be maintained against Gerber, the only defendant who acted under color of law, it must fail as to the others. *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965).

APPENDIX B

CONNELL, J.C.

This is an action brought under the Civil Rights Act of 1871, 42 U.S.C.A. 1983.[1] Plaintiff says that because of certain alleged conspirational conduct of the defendants he was, in investigatory and trial proceedings that followed the 1954 murder of his wife, and which culminated in his later reversed conviction, deprived of a fair trial, due process of law and the rights, privileges and immunities secured to him by the United States Constitution.

At the time of the alleged conspiratorial conduct, defendant E. W. Scripps Co. was publisher of the Cleveland Press, of which defendant Seltzer was the Editor. Defendant Gerber was the Coroner of Cuyahoga County, Ohio, which embraces the City of Cleveland, location of plaintiff's trial, and Bay Village, Ohio, location of plaintiff's residence and scene of his wife's murder.

Defendants have moved to dismiss the complaint, asserting, among other things, that the complaint fails to state a claim upon which relief can be granted as to defendant Gerber and, since he is the only defendant chargeable with action "under color of state law," consequently as to the others as well.

At the outset, this court determines that the complaint must fail in its entirety if, for any reason, it is insufficient to state a claim as to Gerber, for, since defendants Scripps and Seltzer are chargeable only as private citizens and cannot be said to act "under color of any State Law,"

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[1] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

it is clear from nearly a hundred years of case law that the Civil Rights Act, affording protection against deprivation of civil rights by state action, is not applicable to them, absent a conspiracy with one so acting. As the Supreme Court said in *The Civil Rights Cases*, 109 U.S. 3, at 17 (1883):

> "An individual ... may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy."

And as more recently stated by the Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1 (1947):

> "Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

To the same effect is the more recent decision in *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E.D. Mo. 1966), in which the District Court said:

"It is now well settled that these civil rights statutes are directed toward governmental action.***

"Mr. Justice Frankfurter in his concurring opinion in *Terry* v. *Adams*, 345 U.S. 461, 473, 73 S. Ct. 809, 815, 97 L. Ed. 1152, stated the concept in this fashion, 'The vital requirement is State responsibility — that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied (civil) rights merely because they are colored.'

"Even Mr. Justice Douglas, from whose concurring opinions plaintiffs quote at length, is committed to the view that 'The Fourteenth Amendment protects the individual against state action, not against wrongs done by individuals.' *United States* v. *Williams*, 341 U.S. 70, at 92, 71 S.Ct. 581, at 593, 95 L.Ed. 758. And as recently as March 28, 1966, in *United States* v. *Guest*, 86 S.Ct. 1170, the Supreme Court stated that such 'has been the view of the Court from the beginning' and '[i]t remains the Court's view today.'"

These authorities have been recognized and applied in this Court in dismissing actions brought under 42 U.S.C. 1983 against private citizens, *Denman* v. *Republic Printing Company*, C 66-150, and *Frankina* v. *Green*, C 66-760.

The principle announced in the foregoing cases has been consistently recognized by the Sixth Circuit Court of Appeals. *Cooper* v. *Wilson*, 309 F.2d 153 (1962); *Kenny* v. *Fox*, 232 F.2d 288 (1956). Most recently, the Court has held that even the acts of a court-appointed attorney who takes an active part in the judicial process, are the acts of a private citizen and do not violate the Civil Rights Act. *Mulligan* v. *Schlachter*, 389 F.2d 231 (February 9, 1968).

Further, under the judicial-immunity doctrine, private citizens, acting in an alleged conspiracy with judges or like officials enjoying immunity, are themselves without liability.

This is the holding in *Haldane* v. *Chagnon*, 345 F.2d 601 (9th Cir. 1965), in which the Court affirmed the granting of a motion to dismiss private individuals from an action in which it was alleged they had conspired under the Civil Rights Act with judges and their bailiff:

> "With the elimination of the defendant judges and bailiff from the case, claims against the defendant attorneys under the Civil Rights Act cannot be stated. The attorneys were not State Officers, and they did not act in a conspiracy with a State Officer against whom appellant could state a valid claim. It follows that they did not, and could not, commit the alleged wrongful acts 'under color of state law or authority'; hence, they are not subject to liability under the Civil Rights Act: *Bottone* v. *Kindsley*, 170 F.2d 703 (10th Cir. 1948), *Skolnick* v. *Martin*, 317 F.2d 855 (7th Cir. 1963), *Skolnick* v. *Spolar*, 317 F.2d 857 (7th Cir. 1963), *Swift* v. *Fourth National Bank of Columbus, Georgia*, 205 F. Supp. 563 (D.C.M.D. Ga. 1962).

In a similar holding in *Shakespeare* v. *Wilson*, 40 F.R.D. 500 (S.D. Cal. 1966), the District Court stated:

> "Private persons are named as defendants under the claim that they were acting in an alleged conspiracy with the state court Judges and Justices. Private persons named as defendants acting in any alleged conspiracy with state court Judges and Justices who would be immune, could not be held liable, since they are not conspiring with persons acting under color of law 'against whom [Plaintiff] could state a valid claim' under 42 U.S.C. §1985 (3). *Haldane* v. *Chagnon*, supra. Nor could these private persons be held liable under 42 U.S.C. §1983 unless they were acting under color of law."

Thus, the charge of conspiracy, however often repeated,

is insufficient to state a cause of action against private individuals unless they act in consort with a public official against whom is stated an actionable claim.

The threshold question in this 1983 action becomes, then, whether the complaint, in fact and at law, adequately states an actionable claim as to Gerber.

Plaintiff charges that, as part of the alleged conspiracy between the coroner's office and the newspaper, Gerber would "use his official position as coroner to act under color of state law and wrongfully implicate, and cause to be tried, the plaintiff." And further that he would "issue statements suggestive of plaintiff's guilt before an impartial jury could be selected; and give false and prejudicial testimony against the [plaintiff] at his trial."

In evaluating the merits of those charges, we take judicial notice that the authority of a Coroner of an Ohio County relating to an inquest and investigation following a murder is set out in the Revised Code of Ohio.[2]

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[2] §313.17 Subpoenas; oath and testimony of witnesses:

"The coroner or deputy coroner may issue subpoenas for such witnesses as are necessary, administer to such witnesses the usual oath, and proceed to inquire how the deceased came to his death, whether by violence to self or from any other persons, by whom, whether as principals or accessories before or after the fact, and all circumstances relating thereto. The testimony of such witnesses shall be reduced to writing and subscribed to by them, and with the findings and recognizances mentioned in this section, shall be kept on file in the coroner's office, unless the county fails to provide such an office, in which event all such records, findings and recognizances shall be kept on file in the office of the clerk of the court of common pleas. The coroner may cause such witnesses to enter into recognizance, in such sum as is proper, for their appearance at the succeeding term of the court of common pleas, to give testimony concerning the matter. He may require any such witnesses to give security for their attendance, and, if any of them fails to comply with his requirements he shall commit such person to the county jail until discharged by due course of law. In case of the failure of any person to comply with such subpoena, or on the refusal of a witness to testify to any matter regarding which he may lawfully be interrogated, the

The powers and duties of an Ohio County Coroner that emerge thereunder are broad, clear, and compelling. He must inquire, conduct hearings, and bring in witnesses. The procedure provides for compulsive attendance of witnesses, and the intervention of a State Judge to require answers to proper questions or risk punishment for contempt. The Coroner may put witnesses under bond for later appearance at Court. He must record statements of witnesses and file them in his office or with the Clerk of the Court. He must inquire as to the cause of death, by whom, and all circumstances relating thereto. The cause, manner and mode

---

probate judge, or a judge of the court of common pleas, on application of the coroner, shall compel obedience to such subpoena by attachment proceedings as for contempt. A report shall be made from the personal observation by the coroner or his deputy of the corpse, from the statements of relatives or other persons having any knowledge of the facts, and from such other sources of information as are available, or from the autopsy."

The weight given to the coroner's report is apparent from the terms of Section 313.19 of the Revised Code:

"The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death."

An Ohio Coroner, under Section 313.20, has the further power to issue writs. And finally, and significantly, that the coroner is under full compulsion of law in the performance of his duties, is to be seen from the concluding section of the statutes prescribing those duties:

§ *313.21* Prohibition

"No coroner shall refuse or neglect to perform any duty required of him by sections 313.101 to 311.22 [313.22], inclusive, of the Revised Code."

Furthermore, the coroner is duty-bound to hold an inquest whenever there is reasonable ground to believe that a death was caused by violence or unlawful means; and, of course, where he has cause to believe that the death was so caused, his duty to act is clear: 13 *Corpus Juris*, 1246; *State ex rel. Harrison* v. *Perry*, 113 Ohio St. 641 at page 647, 648, 150 N.E. 78 (1925).

of death as he so finds become the legally accepted manner and mode in which death occurred, and only the Court, on hearing, can direct him to change his decision as to manner or mode of death. The Coroner is specifically prohibited by law from neglecting to perform the various duties outlined in these sections.

We have undertaken to examine the sufficiency of the complaint within the context of the interplay between those statutory duties and powers and the language of §1983 itself.

Section 1983 quite clearly sets forth the elements necessary to state a cause of action thereunder: (1) a person acting under color of law must engage in conduct, (2) which subjects the complainant to a deprivation of the rights, privileges or immunities secured to him by the Constitution and laws of the United States. *Sinchak* v. *Parente*, 262 F. Supp. 79 (W.D. Pa. 1966); *Basista* v. *Weir*, 340 F.2d 74 (3rd Cir. 1965).

Addressing ourselves to plaintiff's specific charges against Gerber, we note that while the complaint alleges that Gerber would "act under color of law and wrongfully implicate, and cause to be tried, the plaintiff," there is no such allegation that anything else Gerber is alleged to have done (i.e. giving press statements and perjuring himself at trial), was done under color of law. Nor, we submit, could it be so charged. In *United States* v. *Classic*, 313 U.S. 299, 326 (1941), "under color of law" was defined as:

> "Misuse of *power, possessed by virtue of State Law* and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." [Emphasis added.]

Even the broad interpretation placed on this definition by the Supreme Court in *Monroe* v. *Pape*, 365 U.S. 167 (1961), which dealt with the meaning of "clothed with the au-

thority of state law" and which expanded that concept to include unauthorized or proscribed conduct as long as the official purported to be clothed with authority, will not render the alleged press statements and perjury herein involved as acts done "under color of law." For even in light of *Pape*, the requirement of misuse of power possessed by virtue of state law remains. And we feel that only through labored reasoning could it be concluded that issuance of press statements, prejudicial or otherwise, is a *power* the coroner possessed by virtue of state law. And we similarly hold as to subsequent testimony at plaintiff's trial; where Gerber would have appeared as any other subpoenaed fact witness. There is nothing peculiar to the office of coroner which would have invested him, by law as coroner, with the *power* to give statements to the press or to provide testimony at trial.

Quite obviously, the conduct the Supreme Court was trying to reach in *Pape* was conduct such as was involved in the case itself — the exercise of *power* without the *right*. And it is inescapable that it is still necessary in these 1983 damage suits that action "under color of law" requires exercising power possessed by state law, power which flows from the office held and which addressed itself to the conduct involved. The most that can be said here is that Gerber's position caused him to be sought out for statements and to be called to testify. But this is an altogether different entity from being possessed of a power inherent in the office itself to do so.

For these reasons[3] we conclude that plaintiff's remain-

[3] As far as the question of the press statements and Gerber's later testimony at trial is concerned, the complaint contains only the conclusory allegations that the statements were prejudicial and that the testimony was perjured. Regarding the press statements we have been informed of neither what was said nor at what stage of the proceedings, and have been informed of no facts to support the charge that the testimony was perjured. And we have reached our determination quite apart from a consideration of the sufficiency of such unsupported allegations.

ing charge is the only one that retains any vitality as properly asserting conduct "under color of law."

And the remaining basis of plaintiff's complaint under Section 1983 is that Gerber as part of the alleged conspiracy would use his position as coroner to act under color of law to have plaintiff falsely and wrongfully indicted, arrested, tried, convicted and imprisoned.

The courts, if not with absolute uniformity, to at least an overwhelming degree, have demanded that highly specific facts be pleaded when a person seeks to invoke the protective shelter of the Civil Rights Act, and hold that vague, conclusory allegations will not suffice. *Dunn* v. *Gazzola*, 216 F.2d 709 (1st Cir. 1954); *Powell* v. *Workmen's Compensation Bd. of State of New York*, 327 F.2d 131 (2nd Cir. 1964); *Sinclair* v. *Parente*, supra; *Pugliano* v. *Stazjak*, 231 F. Supp. 347 (W.D. Pa. 1964), aff'd 345 F.2d 797 (3d Cir. 1965); *Wegandt* v. *Mason's Stores, Inc.*, 279 F. Supp. 283 (W.D. Pa. 1968); *Williamson* v. *Waugh*, 160 F. Supp. 72 (S.D. W. Va. 1953); *Hanna* v. *Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960); *Crawford* v. *Lydick*, 179 F. Supp. 211 (W.D. Mich. 1959), aff'd 280 F.2d 426 (6th Cir. 1960); *Ortega* v. *Bagen*, 216 F.2d 561 (7th Cir. 1954); *Daly* v. *Pedersen*, 278 F. Supp. 88 (D. Minn. 1967); *Agnew* v. *City of Compton*, 239 F.2d 226 (9th Cir. 1956).

If such a demand seems at variance with the liberality that is the life spirit of the Federal Rules, it emerges as well justified when one considers that "if the rule were otherwise, every complaint against a State official by the simple expedient of averring conclusions would be cognizable in the federal courts under the Civil Rights Act." *United States ex rel. Hoge* v. *Bolsinger*, 211 F. Supp. 119, 201 (W.D. Pa. 1962).

Certainly it is reasonable that the Court be satisfied that there exist in fact, and not mere fancy, a justiciable grievance before it will summon a state official to the bar. This

demands that the court be apprised of facts, and spared conjecture. Harassment, vindictiveness and disruption of the orderly processes of state government are the necessary hand-maidens of the alternative.

[We here choose to note that as far as the charge of conspiracy itself is concerned, although not determinative of plaintiff's rights as to Gerber (since § 1983 does not require a conspiracy), but certainly relevant to the cause of action as to the other defendants, we find particularly compelling the pronouncement of the court in *Crawford* v. *Lydick*, supra, at 216:

> In his complaint plaintiff alleges that newspaper published in the city of Kalamazoo, Michigan, conspired with Kalamazoo city police and the Kalamazoo county sheriff's department to ruin his reputation by printing a photograph of him and also printing false, malicious, slanderous, and abusive statements about him and thereby deprived him of a fair and just trial. The bare and unsupported conclusions of a conspiracy between police officers and the Kalamazoo newspaper, without specifications of any particular facts upon which he bases his conclusion is wholly without merit.

The bare conclusory allegations of conspiracy present here lead us to the same conclusion.]

And if the complaint fails to allege with any degree of specificity facts to support the charge that Gerber acted under color of law to wrongfully implicate and cause to be tried the plaintiff and thus to have caused him a deprivation of various constitutional guarantees, the reason for the absence of facts to support that charge seems apparent. It could hardly be asserted, and it is not, that defendant Gerber and more clearly the defendants Scripps and Seltzer, personally or direct "arrested" plaintiff, "in-

dicted" him, "convicted" him, or "imprisoned" him. Further, no conspiracy is charged with those who did so.

Section 1983 makes actionable only that conduct under color of law which causes a person to be deprived of his legal or constitutional rights.

As the Court of Appeals for the 5th Circuit, in *Whittington v. Johnson*, 201 F.2d 810 (1953), said:

> "It is a *non sequitur* to say that merely by instituting the lunacy proceeding, the defendants 'caused' complaintant to be deprived of her right to due process within the meaning of 8 U.S.C.A. §43. If there was any denial of due process, the efficient cause thereof was the omission of the state probate judge to give notice of the proceeding. That failure is not attributable to these defendants. Whether or not notice should be given is committed by the Alabama statute to the discretion of the probate judge. These defendants had no duty in that behalf. They simply instituted the lunacy proceeding as the Alabama statute authorized them to do, and left the conduct thereof wholly to the discretion of the probate judge whose duty and function it was to give any necessary notice. The mere institution of the lunacy proceeding, without more, is too remote in the chain of causation to support an action under 8 U.S.C.A. §43 for 'causing' complaintant to be deprived of the right to due process." Id. at 811-12.

This reasoning was applied by the Sixth Circuit Court of Appeals in *Cuiksa* v. *City of Mansfield*, 250 F.2d 700 (6th Cir. 1957), where the court stated:

> "The actions of the constable in initiating the prosecution and in testifying did not deprive the appellant of any constitutional right. Nor is he responsible for the subsequent actions and rulings of the judge. *Whittington* v. *Johnson*, 5th Cir., 201 F.2d 810-812, cer-

tiorari denied 346 U.S. 867, 74 S. Ct. 103, 98 L. Ed. 377, cited by us with approval in *Kenney* v. *Fox*, supra, and *Bartlett* v. *Weimer*, 6th Cir., 244 F.2d 955. Appellant Smith had no cause of action under the Civil Rights Act against the constable."

In accord: *Puett* v. *City of Detroit*, et al., 323 F.2d 591 (6th Cir. 1963); *Wegandt* v. *Mason's Stores, Inc.* supra.

In the within matter, Coroner Gerber, in accordance with his statutory obligation, conducted an inquest, reduced testimony to writing, decided the cause of death, and filed his report. That is all he did under color of law. That is exactly what the law required him to do; that is exactly what the law determined he should not fail to have done. Under Ohio law, only the Prosecuting Attorney could decide to take this matter to the County Grand Jury; only the County Grand Jury could decide whether to find a True Bill against plaintiff, or to No-Bill the case. From there on, the coroner could be a witness as to cause of death, but the matter was otherwise within the complete power of control of the Prosecutor's Office and the Court.

Hence, nothing Gerber is alleged to have done under color of law could properly be said to be the *cause* of any deprivation of rights the plaintiff allegedly suffered.

Assuming, *arguendo*, that the complaint is sufficient to have stated a cause of action against Gerber as far as his actions under color of law are concerned, our disposition would still be the same, for we determine that Gerber is immune from suit in this civil damage action.

In the area of judicial immunity, the Supreme Court of the United States has very recently affirmed that the Civil Rights Act has not abrogated the principle of judicial immunity, saying in *Pierson* v. *Ray*, 386 U.S. 547 (1967):

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their

judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley* v. *Fisher*, 13 Wall. 335 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (*Scott* v. *Stansfield*, L.R. 3 Ex. 220, 223 (1868); quoted in *Bradley* v. *Fisher*, supra, 349, note, at 350). It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.

"We do not believe that this settled principle of law was abolished by 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this court held in *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

Thus, it is apparent that the Supreme Court of the United States in *Pierson* held judges immune from liability, not for

the mere purpose of protecting a judge personally, but, "for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences."

That the doctrine of judicial immunity has not been abrogated by the Civil Rights Act has consistently been the holding of the 6th Circuit. See *Kenney* v. *Fox*, 232, F.2d 288 (1956); *Copley* v. *Sweet*, 234 F.2d 660 (1956); *Cuiska* v. *City of Mansfield*, supra; *Crawford* v. *Lydick*, supra; *Saier* v. *State Bar of Michigan*, 293 F.2d 756 (1961); *Andrews* v. *Murphy*, 349 F.2d 114 (1965); *Gabbard* v. *Rose*, 359 F.2d 182 (1966).

This umbrella of judicial immunity in these Civil Rights Act damage actions has not been restricted to judges alone, but has been held to apply to these whose duties are recognized as quasi-judicial. *Kenney* v. *Fox*, supra; *Bartlett* v. *Doty*, 174 F. Supp. 94 (N.D. Ohio, W.D. 1959); *Simons* v. *O'Connor*, 187 F. Supp. 702 (S.D.N.Y. 1960); *Ruduicki* v. *McCormack*, 210 F. Supp. 905 (D. Mass. 1962); *Sires* v. *Cole*, 320 F.2d 877 (9th Cir. 1963); *Aguew* v. *Moody*, 330 F.2d 868 (9th Cir. 1964); *Sarelas* v. *Sheehan*, 353 F.2d 5 (7th Cir. 1965); *Haldane* v. *Chagnon*, supra; *Gabbard* v. *Rose*, supra.

The powers, duties, and responsibilities hereinbefore enumerated as comprising what the State of Ohio requires a Coroner to perform, constitutes an Ohio Coroner as occupying an office which is quasi-judicial in character.

In so holding, the Supreme Court of Ohio said in *State, ex rel. Harrison* v. *Perry*, supra, at 644-5, that a county coroner is clothed with authority,

> "quasi judicial in character when he is required to make a finding upon evidence as to whether or not a person whose body is found in the county came to his death by unlawful or suspicious means, and proceed to inquire how the deceased came to his death, whether

by violence from any other person or persons,***and all circumstances relating thereto."

And since we have determined that the only conduct Gerber could be said to have done under color of law is the very conduct the State of Ohio characterizes and recognizes as quasi-judicial in nature, we hold that he is here immune from suit.

We need not here decide whether the complaint states a claim within this Court's diversity jurisdiction for, on the face of the complaint, it appears that requisite diversity of citizenship is neither present (see Title 28, § 1332; Wright, *Federal Courts*, § 24, 1963; 7A, Moore's *Federal Practice* ¶ 1332 (1964); *Alla* v. *Kornfeld*, 84 F. Supp. 823; *Pemberton* v. *Colonna*, 290 F.2d 220) nor, in fact, is it alleged.

For all of the foregoing reasons, the motions of the defendants for dismissal are granted.

IT IS SO ORDERED.

(s) JAMES C. CONNELL
JAMES C. CONNELL
United States District Judge

Dated July 3rd. 1968.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. C-67-838

SAMUEL H. SHEPPARD
33 Mosel Str.
Duisburg, West Germany,
Plaintiff
v.
THE E. W. SCRIPPS COMPANY
901 Lakeside Ave.
Cleveland, Ohio
LOUIS B. SELTZER
17825 Lake
Cleveland, Ohio
SAMUEL R. GERBER
11424 Cedar Rd.
Cleveland, Ohio,
Defendants

Plaintiff's Complaint

1. The Plaintiff, Samuel H. Sheppard presently resides at and is domiciled in Duisburg, West Germany. The Defendants, Louis B. Seltzer and Samuel R. Gerber are citizens of the State of Ohio. The Defendant, The E.W. Scripps Company is a corporation incorporated under the laws of the State of Ohio.

2. This action arises under the Fourteenth Amendment to the Constitution of the United States under title 42 §1983 of the United States Code. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand and 00 100 Dollars ($10,000.00).

3. The Defendant, Louis B. Seltzer was, at the time of the wrongs herein complained of, the editor of a newspaper called "The Cleveland Press"; said newspaper was published by the Defendant, The E. W. Scripps Company.

4. The Defendant, Samuel R. Gerber, was at the time of the wrongs complained of, and still is, the coroner of Cuyahoga County State of Ohio. As such coroner, he had the duty and the authority to investigate and report causes of deaths occurring within said County.

5. The Plaintiff, Samuel H. Sheppard was in 1954 a physician residing and practicing in Cuyahoga County, State of Ohio, and specializing in neurosurgery. The Plaintiff in 1954 had an active and successful medical practice.

6. On or about the 4th day of July, 1954, Marilyn Sheppard, then the Plaintiff's wife, was murdered in her home on Lake Road in Bay Village, Ohio by a person or persons to the Plaintiff unknown.

7. Following such murder, the Defendant, Samuel R. Gerber, commenced an investigation into its causes and into the identity of the person or persons responsible for it.

8. Following the murder, the Defendants, Louis B. Seltzer and The E. W. Scripps Company commenced an editorial attack upon the Plaintiff in the Cleveland Press, which was designed and calculated to, and did in fact, cause elective prosecuting officials to accuse him of complicity aforesaid.

9. Between July 14, 1954 and July 30, 1954, the Defendants, Louis B. Seltzer and The E.W. Scripps Company conspired with the Defendant, Samuel R. Gerber, to implicate, accuse, arrest and indict the Plaintiff for the said murder, even though each of said Defendants well knew that the Plaintiff had nothing to do with the murder of Marilyn Sheppard. It was part of said conspiracy that the Defendant, Samuel R. Gerber, would use his official position as coroner to act under color of state law and wrongfully implicate, and cause to be tried, the Plaintiff.

10. It was further a part of the conspiracy aforesaid that the Defendants, Louis B. Seltzer and The E.W. Scripps Company would mount and launch an attack upon the Plaintiff calculated to prevent him from obtaining a fair trial before an impartial jury or a fair judge. It was further a part of the said conspiracy for the Defendants, Louis B. Seltzer and the E. W. Scripps Company to so influence, intimidate and control the trial judge who presided at Plaintiff's criminal trial for the murder of his wife, Marilyn Sheppard, as to cause said judge to make wrongful and adverse rulings to the Plaintiff. It was further a part of said conspiracy for the Defendant, Samuel R. Gerber, to issue statements suggestive of Plaintiff's guilt before an impartial jury could be selected; and to give false and prejudicial testimony against the Defendant at his trial. It was further a part of the conspiracy for the Defendants, Louis B. Seltzer, and The E. W. Scripps Company to publish, during the trial, and to thus call to the attention of the Plaintiff's petit jury, hearing the case against him, prejudicial and inadmissible material which the Defendants well knew could not reach said jury in the courtroom and which the Defendants knew would cause the Plaintiff's wrongful conviction.

11. The Defendants effectuated each of the above-described illegal and wrongful acts, and thus caused, as planned, the wrongful conviction of the Defendants.

12. In so conspiring and acting, the Defendants deprived the Plaintiff of his Federal constitutional right to a fair trial under the Fourteenth Amendment to the United States Constitution.

13. By so conspiring and acting, the Defendants deprived the Plaintiff of Due Process of Law under the Fourteenth Amendment to the Constitution of the United States.

14. By so conspiring and acting, the Defendants deprived the Plaintiff of the rights, privileges, and immunities secured to him by the United States Constitution. As a

result of such conspiracy and action by the Defendants, the Plaintiff has been damaged, (1) by his imprisonment for approximately ten years in various jails and prisons in the State of Ohio, (2) by a loss of income for thirteen years as a physician licensed in the State of Ohio, (3) by the fees, costs, and expenses of defending himself against the indictments and judgments wrongfully procured as set forth above, and (4) by the loss of reputation and community respect suffered as a result of these proceedings.

WHEREFORE, Plaintiff demands:

1. That the Defendants be required to pay to the Plaintiff such damages as Plaintiff has sustained in consequence of Defendants' unlawful acts as aforesaid.

2. That Plaintiff have such other and further relief as the law and justice may require.

A trial by jury is hereby requested.

(s) RUSSELL A. SHERMAN
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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 645.

BETTY LOU STRICKLAND,
EXECUTRIX OF THE ESTATE OF
SAMUEL H. SHEPPARD,
Petitioner,

vs.

THE E. W. SCRIPPS COMPANY,
LOUIS B. SELTZER,
SAMUEL R. GERBER,
Respondents.

BRIEF OF RESPONDENTS THE E. W. SCRIPPS COMPANY AND LOUIS B. SELTZER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Sixth Circuit (Judges Peck and Combs), and the concurring opinion (Judge McCree) (Petition App. A.) are reported at 421 F.2d 555. The opinion of the District Court (Pet. App. B.) is not reported.

JURISDICTION; QUESTION PRESENTED, AND STATUTE INVOLVED.

The jurisdictional requisites and the question presented are set forth in the Petition. The statutory provision involved is Section 1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. Section 1983, printed in Appendix 1, *infra*, p. 7.

PARTIAL RESTATEMENT OF THE CASE.

The Petition is incomplete and inaccurate in the following respects:

1. Samuel H. Sheppard died on April 6, 1970, while the case was still pending in the Court of Appeals. The mandate of affirmance went to the District Court on April 15, 1970. No motion for substitution has been filed in *any* court to date, and more than six months has now elapsed since the death.

2. The Petition presents no "special and important reasons" for review, as described in Rule 19 of this Court, and Petitioner claims none.

3. The decision by the Court of Appeals was unanimous; Judge McCree did *not* dissent as misstated by counsel for Petitioner on page 8 of the Petition.

4. The single "Question Presented" questions merely one of the *reasons* assigned by two of the judges of the Court of Appeals for the affirmance. The affirmed judgment is fully sustained by grounds relied upon by *both* courts below and *not* questioned by Petitioner.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I.

THIS ACTION DID NOT SURVIVE THE DEATH OF SAMUEL H. SHEPPARD, AND HAS ABATED.

Sheppard died on April 6, 1970, *before* the filing of the Petition For Writ Of Certiorari. No motion for substitution of parties (a requisite to revivor here and in the courts below) has been filed in any court. More than six months has elapsed since Sheppard's death. The action has abated. (*See* Rule 48 of this Court.)

Moreover, even if revivor had been attempted, this particular cause of action did not survive Sheppard's death under applicable law.[1] Non-survival of the cause of action precludes revivor of the action.[2]

Therefore, this action is not susceptible of dispositive review, and the writ should be denied. *Martin v. Baltimore and Ohio R. Co.*, 151 U.S. 673, 703.

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[1] Under federal case law and 42 U.S.C. Section 1988, reference must be had to state law to determine whether the particular Section 1983 action survives death, if indeed such causes of action ever survive. *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 67-68; *Martin v. Baltimore and Ohio R. Co.*, 151 U.S. 673, 692; *Baker v. F. & F. Investment Co.*, 420 F.2d 1191, 1196 (7th Cir., 1970), *cert. denied*, 39 U.S.L.W. 3134 (U.S. Oct. 13, 1970); *Brazier v. Cherry*, 293 F.2d 401, 407 (5th Cir., 1961), *cert. denied*, 368 U.S. 921; *Pritchard v. Smith*, 289 F.2d 153, 157 (8th Cir., 1961). The allegations of this Complaint, when stripped of Section 1983 verbiage, amount to an action for malicious prosecution under Ohio law. *Rogers v. Barbera*, 170 Ohio St. 241, 244, 164 N.E.2d 162, 165 (1960). In Ohio no specific statute provides for survival of federally created or civil rights causes of action, and malicious prosecution causes of action do *not* survive the death of the plaintiff. *State ex rel. Crow v. Weygandt*, 170 Ohio St. 81, 84, 162 N.E.2d 845, 848 (1959).

[2] The substitution procedure is not available where the cause of action is extinguished by death. Fed.R.Civ.P. 25(a)(1), formerly 28 U.S.C. § 778 (1928).

II.

THE PETITION PRESENTS NO "SPECIAL AND IMPORTANT REASONS" FOR REVIEW, BUT SEEKS MERELY A REEXAMINATION OF AN ADVERSE DECISION APPLICABLE ONLY TO PETITIONER'S DECEDENT.

The Petitioner ignores the fact that certiorari has not been granted in this case and presents what amounts to a brief on the merits. No adequate reason for review is stated or attempted. The Petitioner seeks merely a re-examination of an adverse decision applicable only to Samuel H. Sheppard during his lifetime.

Moreover, Petitioner does not challenge the judgment, but merely one of the reasons assigned by two judges in affirming the judgment below.

III.

THE JUDGMENT OF THE DISTRICT COURT AFFIRMED UNANIMOUSLY BY THE COURT OF APPEALS IS CORRECT AND FULLY SUPPORTED BY GROUNDS NOT QUESTIONED BY PETITIONER AND THEREFORE IS NOT SUBJECT TO REVIEW.

The judgment affirmed by the Court of Appeals is fully sustainable on grounds not challenged by Petitioner. One such ground is that of quasi-judicial immunity, relied upon by the District Court and expressly approved by concurring Judge McCree.[3] Judges Peck and Combs found it unnecessary to examine this ground. Petitioner does not challenge its propriety.

Another ground, also *not* challenged by Petitioner, fully supports the judgment affirmed. Both courts below

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[3] Petitioner's arguments in this Court are based entirely upon the first paragraph of Judge McCree's concurring opinion but Petitioner makes no effort to challenge Judge McCree's affirmance on the ground of quasi-judicial immunity. Presumably, this results from Petitioner's erroneous belief that Judge McCree dissented when in fact he concurred in the affirmance.

held that the only persons having the power or authority under color of law to commit the constitutionally deprivative acts complained of (*i.e.*, the allegedly wrongful accusation and trial) were the grand jury which indicted, the police who arrested, the county prosecutor who prosecuted, the trial judge who presided, and the petit jury which convicted (Pet. App. A, pp. 13-14; App. B, pp. 23-25, 26-28). The Petitioner does not allege that any of the Respondents conspired with any of those persons, and the lower courts properly ruled that absent such a conspiracy a Section 1983 action could not be maintained against Respondents.

Petitioner neither questions nor argues the propriety of the foregoing holdings, either one of which is sufficient to support the entire judgment regardless of any reference to or reliance upon *Sheppard v. Maxwell*, 384 U.S. 333, by two of the appellate judges.

The narrowness of what is offered as the single issue for this Court's determination comes into sharp focus when the "Question Presented" is analyzed. Petitioner submits as the sole issue for review whether two of the appellate judges were correct in citing and relying upon the opinion in *Sheppard v. Maxwell* as a reason for their affirmance of the judgment below. The District Court did not cite or rely on *Sheppard v. Maxwell*, nor did the concurring appellate judge. But whether a Court of Appeals is correct in assigning a particular *reason* for its affirmance of a judgment fully sustainable on other grounds is not a question meriting review by this Honorable Court.[1]

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[1] A *full* reading of the opinion in *Sheppard v. Maxwell, supra*, reveals far more reason for the two appellate judges' partial reliance thereon than the Petitioner's carefully fragmented quotations and gross omissions therefrom are designed to suggest. But regardless, the overriding point is that the sole narrow issue presented by Petitioner's "Question Presented" is not dispositive.

Moreover, the only two judges citing *Sheppard v. Maxwell*, stated clearly that they would still have affirmed, *regardless of that opinion*:

> We observe, however, that even in the absence of the opinion in *Sheppard v. Maxwell, supra*, the greater weight of authority and better reasoned decisions would require us to find the lack of a cause of action. *Striker v. Pancher*, 317 F.2d 780 (6th Cir. 1963); *Cuiksa v. City of Mansfield*, 250 F.2d 700 (6th Cir. 1957); *Dunn v. Gazola*, 216 F.2d 709 (1st Cir. 1954); *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1954); *Reinke v. Walworth, County Sheriff*, 282 F. Supp. 377 (E.D. Wis. 1968); *Sinchak v. Parente*, 262 F.Supp. 79 (W.D. Pa. 1966). (Pet. App. A., p. 13)

It is clear therefore, that the single "Question Presented" by Petitioner does not offer a dispositive question for review even within this case, and certainly no question of "special and important" interest generally.

CONCLUSION.

For the foregoing reasons, the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

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DON H. PACE,
Attorneys for Respondents
The E. W. Scripps Company
and Louis B. Seltzer.

Certiorari was denied in *Cuiksa v. City of Mansfield*, 356 U.S. 937, and in *Whittington v. Johnston*, 346 U.S. 867.

APPENDIX 1.

42 U.S.C. § 1983.

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 645.

BETTY LOU STRICKLAND,
EXECUTRIX OF THE ESTATE OF
SAMUEL H. SHEPPARD,
Petitioner,

vs.

THE E. W. SCRIPPS COMPANY,
LOUIS B. SELTZER,
SAMUEL R. GERBER,
Respondents.

BRIEF OF RESPONDENT SAMUEL R. GERBER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT SAMUEL R. GERBER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Counsel for respondent Samuel R. Gerber has been served by the printer with copies of the brief of respondents The E. W. Scripps Company and Louis B. Seltzer.

Upon a full reading of the brief filed by the said respondents, it appears that the subject matter is fully covered and further argument on the part of respondent Gerber would only belabor the points unnecessarily and clutter the court's record.

On behalf of respondent Gerber, it will simply be observed that the petition for writ of certiorari is mistakenly founded upon an appeal attempting to substitute passion, prejudice and inflamatory rhetoric in lieu of any legal grounds which would invoke the exercise of the

jurisdiction of this Court. Such a petition should be denied.

Respectfully submitted,

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